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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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MM Docket No. 95-176

In the Matter of

Closed Captioning and Video Description of
Video Programming

Implementation of Section 305 of the
Telecommunications Act of 1996

Video Programming Accessibility

REPLY COMMENTS
of
BET HOLDINGS, INC.

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BET Holdings, Inc. submits these Reply Comments, in which it responds to comments filed by other parties, and addresses issues concerning the *Notice of Proposed Rulemaking* ("NPRM") released by the Federal Communications Commission ("Commission") on January 17, 1997, in the captioned matter.

BET Holdings is engaged in the production and distribution of video programming. BET Holdings operates several satellite-delivered video programming services that are distributed nationwide by cable systems, direct broadcast satellite services, and other multichannel video programming distributors. These services include Black Entertainment Television ("BET"), BET On Jazz: The Cable Jazz Channel ("BET On Jazz"),¹ and Action Pay-Per-View.

¹ BET On Jazz filed joint comments in response to the NPRM with other new, low-penetrated programming networks, in which it proposed that programming distributed by a national basic cable network should be classified as exempt until the network achieves 20 million subscribers. *See* Comments of Outdoor Life Network, Speedvision Network, The Golf Channel, BET On Jazz, and America's Health Network in *Closed Captioning and Video Description of*

While BET Holdings has a broad interest in the Commission's implementation of closed captioning rules, these reply comments address the specific, but vitally important, issues of captioning of music programming and sports programming.

I. INTRODUCTION AND SUMMARY

BET Holdings supports the closed captioning of video programming, not only because it is a congressionally mandated national goal and of substantial importance to persons with hearing disabilities, but because it is in the long-term business interest of BET Holdings' program networks. Those networks seek to reach the widest possible viewing audiences, including both the hearing and the hearing disabled. Larger audiences will contribute to the networks' subscription and advertising revenues, and ultimately will enable the networks to expand the quantity and scope, and further enhance the quality, of their programming. Including the millions of persons with hearing disabilities within the BET family of viewers is a priority, and BET Holdings is committed to captioning substantial amounts of its networks' programming.

As Congress recognized, however, not every type of programming should be subject to the captioning requirement. In Congress' wisdom, the question of whether to exempt particular types of programming from required captioning depends primarily on a cost/benefit analysis that acknowledges that captioning is very expensive, that there are not unlimited funds available for captioning, and that certain types of programming should not be subject to mandatory captioning

Video Programming, Notice of Proposed Rulemaking, MM Docket No. 95-176 (filed Feb. 28, 1997, corrected copy filed Mar. 6, 1997). The proposals submitted herein are fully consistent with this earlier proposal.

because the more limited benefits to be derived from captioning such programming are outweighed by the substantial costs and burdens of captioning.

BET Holdings is confronted by that cost/benefit balance in the case of its music and niche, minority sports programming. Like every other program network, BET Holdings operates on a limited program acquisition and production budget. Dollars to be spent in the future on captioning are dollars that otherwise would be spent on increasing the quantity, and enhancing the quality, of the BET networks' programming. Consequently, while BET Holdings believes that much of the programming on its networks should be captioned in compliance with the rules to be adopted by the Commission, it is compelled to take issue with the proposed requirement of captioning in two areas -- music programming, and niche, sports programming -- where the limited benefits to be achieved by captioning are greatly outweighed both by the costs that captioning would entail and by the adverse impact that such costs would have on the BET networks' ability to continue to provide diverse, quality programming to all of their subscribers.

In the following reply comments, BET Holdings first explains why *music programming* in general should not be subject to a requirement of captioning. Unlike movies, news and sitcoms, where the spoken word is the auditory element of paramount importance, in music programming -- whether vocal or instrumental, whether music video or musical performance -- it is the *musical* component that is the central element of the programming and that is the main attraction to viewers. While captioning is effective in augmenting many types of television programming for persons with hearing disabilities, captions are not an effective substitute for music, even if the music has verbal content. Thus, even if music programming were to be captioned, it is unlikely that substantial numbers of persons with hearing disabilities would

generally choose to watch captioned music programming. More likely, they would choose to watch other types of programs that are better-suited to captioning, where captioning is far more effective in replacing the spoken word and in enhancing the worth of the programming to hearing impaired persons. In applying the cost/benefit analysis that Congress has edicted for determining classes of programming to be exempt from required captioning, this factor, when weighed against the substantial cost of captioning music programming, compels the conclusion that music programming should generally be exempt from required captioning.

BET Holdings next addresses specific issues raised by the Commission's NPRM and comments of other parties. Regarding *music videos*, BET Holdings explains that the Commission has based its tentative conclusion regarding required captioning of music videos on a number of erroneous assumptions that have led the Commission to underestimate the burden of its proposed requirement that all music videos be captioned. As BET Holdings explains, the cost of captioning all of its music videos would devastate its program budget and would affect the quantity and quality of its future program acquisitions and production. Indeed, this burden is so great that it could force BET not to air videos that are provided uncaptioned by record companies, at a direct cost to the diversity of the music video programming that BET provides to its viewers. Consequently, BET Holdings urges the Commission to exempt music videos from required captioning. Alternatively, BET Holdings proposes that the Commission at least exempt from required captioning videos that are obtained from "small-label" record companies, as these companies generally provide uncaptioned videos of newly discovered, lesser-known artists whose work greatly contributes to the diversity of BET's program mix.

BET Holdings next proposes that the Commission exempt all *musical performance programming*, which it defines as a video program comprised of more than fifty percent musical performances. As BET Holdings explains, captioning of musical performances -- even if they contain verbal content -- is generally inadequate to compensate for the absence of the auditory element. Of course, captioning cannot replace the missing instrumental element of music programming. Moreover, captioning is even frequently unable to replicate musical lyrics, since these are often either non-literal, improvisational or indecipherable. But even when music lyrics can be effectively translated into text, captions are inherently limited in their ability to substantially enhance the viewing experience of musical performances for persons with hearing disabilities, since captioning cannot reproduce, and is not an adequate substitute for, the artist's sound or vocal delivery. Consequently, even if musical performance programming is captioned, hearing impaired viewers are likely to choose other forms of programming in which captions are a more effective substitute for the auditory component. Consequently, BET Holdings proposes that all musical performance programming be exempt from required captioning, and that the exemption apply to any program in which musical performances comprise more than fifty percent of the program content, excluding commercials and interstitials. Alternatively, BET Holdings proposes that the Commission exempt musical performance programming that is primarily instrumental (*i.e.*, more than fifty percent musical performances without literal lyrics).

BET Holdings also proposes that the Commission exempt "*ins and outs*," the brief segments of dialogue used to transition into and out of the presentation of music video and music performance programming. It is unlikely that significant numbers of persons with hearing disabilities will choose to view "ins and outs", even if captioned, since they comprise such a

small portion of the music programming that they accompany and since hearing impaired persons likely will not otherwise choose to watch the music video and music performance programs in which the "ins and outs" are included. Moreover, the cost and complexity of captioning these segments would be so substantial that, weighed against the marginal importance of such segments to the programs, BET Holdings and other networks would likely be forced to reduce the extent of "ins and outs" included in their music video and music performance programs if these segments were required to be captioned.

Finally, on the subject of music programming, BET Holdings supports, both as a matter of common sense and economic reality, the Commission's tentative proposal to exempt *background music* from mandated captioning. Given the technical complexity and cost of, and limited incremental benefit to be derived from, captioning music that is inherently secondary and incidental to the primary program content, it is appropriate for the Commission to specify in its rules that background music need not be captioned.

On the issue of *niche sports programming*, BET explains that it provides coverage of niche sports events of particular interest to its target audience -- African-Americans. These events, such as football games of historically black colleges, receive little coverage, if any, from other television networks, and their ratings pale in comparison to sporting events involving the major professional and college sports teams and events. By necessity, BET's production budgets are kept extremely lean for these events. Mandated captioning for events like those covered by BET would add considerably to their production costs, and would make their continued coverage difficult, if not impossible, thereby striking a blow against the diversity in programming that BET Holdings strives to provide to its viewers. BET Holdings therefore proposes that the Commission

exempt from required captioning niche sports programming that does not involve major professional or college teams, major national and regional sports events, or the large audiences and production budgets associated with such events.

II. IDENTIFICATION AND INTEREST OF BET HOLDINGS, INC.

A. OVERVIEW OF BET

BET is a 24-hour showcase of black entertainment, music videos, niche sports, talk shows and situation comedies, as well as news, public affairs and youth programming. While many programming services provide one or more of these general categories of programming, BET is unique in seeking to provide programming in all of these categories that appeals specifically to African-American viewers.

Music is an integral part of BET's overall programming mix, comprising approximately sixty percent of its total programming. Shows featuring music videos make up the bulk of BET's music programming, including:

- "Planet Groove," BET's new prime-time music video show, which spotlights the music world's most-recent videos, and provides the latest in entertainment, interviews and in-studio performances;
- "Video Gospel," featuring high-spirited, all-star gospel music videos recorded by leading musical artists for the whole family;
- "Rap City," which showcases videos performed by African-American hip-hop and rap artists, and includes celebrity interviews, behind-the-scenes coverage and hip-hop "edutainment";

- "Video Vibrations," in which a "video jockey" presents three hours of world premiere videos as well as rhythm and blues, house, rap and hi-energy dance music;
- "Caribbean Rhythms," a music video/travel show devoted to the island sounds of reggae, calypso, dance-hall and salsa music, filmed on location in the Caribbean and West Indies;
- "Midnight Love," a 90-minute music video show that features ballads and serenades from popular rhythm and blues artists;
- "Unreal," a two-hour daily program featuring music videos, vignettes, and an some musical performances; and
- "Hit List," in which the most-requested videos of the day are presented in a one-hour format.

Several of BET's regular programs and special productions feature live or prerecorded musical performances, including:

- "Teen Summit," BET's award-winning, ninety minute, live talk and music performance show focusing on young people's perspective on issues, values and lifestyles;
- "Bobby Jones Gospel Show," in which Bobby Jones and the New Life Singing Aggregation deliver traditional and contemporary gospel music through their own performances and special guest appearances by top-notch recording artists; and
- entertainment specials presented throughout the year by BET, including a variety of music programming, such as the "St. Lucia Jazz Festival."

BET also presents sports programming targeted to meet the special interests of its target audience. For example, the network covers football games of historically black colleges and universities in the CIAA, SIAC, MEAC and SWAC athletic conferences. These colleges receive

little coverage, if any, by the major national broadcast and/or cable networks. This coverage benefits these institutions by providing financial support and national television exposure for their sports programs. Similarly, BET provides coverage of the American Basketball League, the newly-formed professional basketball league for women, which to date has secured little national distribution over other television media.

B. OVERVIEW OF BET ON JAZZ

BET On Jazz is the nation's first television programming service dedicated exclusively to jazz music and includes in-studio performances, documentaries, concert coverage and celebrity interviews. The network launched in January 1996, and is available to approximately 1.2 million subscribers. Eighty percent of BET On Jazz's programming consists of musical performances, which are largely instrumental. Approximately fifty percent of the programming currently provided by BET On Jazz is original, and is produced in the network's state-of-the-art television production and distribution facility in Washington, D.C.

Musical performances of the jazz art form comprise a significant segment of the network's programming. Examples of the programming currently offered on BET On Jazz include:

- "Jazz Central," an original one-hour program featuring performances, concerts and in-depth interviews with renowned jazz artists;
- "Jazz Discovery," a weekly program that showcases undiscovered jazz talent;
- "Performances," on which leading Canadian jazz artists perform;
- "Classic Concerts," featuring vintage concert performances from major jazz artists; and
- "Uncut," which presents full-length performances by top jazz artists.

In addition, several of BET On Jazz's regular programs feature jazz music videos, including:

- "Jazz Moods," a one-hour show featuring easy jazz music videos; and
- "Jazz Vocals," a one-hour show presenting jazz music videos featuring a contemporary style jazz music videos.

C. OVERVIEW OF ACTION-PAY-PER-VIEW

Action Pay-Per-View is a 24-hour service that emphasizes action, science fiction and thriller movies. The network also features live concerts and sports events. The network is available to approximately 8 million subscribers.

III. THE COMMISSION SHOULD ADOPT EXEMPTIONS FROM REQUIRED CAPTIONING APPLICABLE TO MUSIC VIDEO AND MUSICAL PERFORMANCE PROGRAMMING, 'TNS AND OUTS" FOR MUSIC PROGRAMMING AND BACKGROUND MUSIC

In the NPRM, the Commission tentatively concluded that (1) music videos and prerecorded musical performances that are not primarily instrumental should not be exempt from its proposed closed captioning rules, and (2) background music and primarily instrumental musical performances should be exempt. NPRM ¶ 82. The Commission made no tentative proposals regarding theme songs or live musical performances. *Id.*

The Commission's proposed treatment of music programming reflects that it has failed to recognize that music programming is *unique* and *fundamentally different* from other forms of video programming. What distinguishes music programming from all other video programming -- and what warrants specially-tailored captioning rules for this programming -- is the fact that *music*, not spoken words or visual action, is its most important component. Simply put, music

is the primary element that attracts television viewers to music programming, while the visual component and the text of the lyrics are inherently of secondary value. This is not to suggest that the visual and lyrical elements in music programming are meaningless to viewers. But it is indisputable that the music component of such programming is paramount. The fact that the visual and lyrical elements are of secondary importance to viewers should inform the Commission's decision-making process as it considers whether certain forms of music programming should be subject to mandatory captioning. For Congress clearly intended that the Commission weigh the relative costs and benefits of captioning, and specifically gave the Commission authority to exempt classes of programming in which the costs and burdens exceed the benefits. In no other form of video programming are the burdens and technical challenges of captioning so high in comparison to the relative benefits that captioning would afford to persons with hearing disabilities.

The unfortunate reality is that captions are not an effective substitute for music. In practical terms, this means that the likelihood that a substantial number of hearing impaired persons will choose to view *music* programming, even if the lyrics are captioned, is small. At one extreme is instrumental music, which simply cannot be captioned as it is not possible to translate notes played by musical instruments into words. But even if the music has verbal content, much is lost in the transcription process. Frequently, musical lyrics are non-literal or are comprised of vocal intonations in which the artist employs his or her voice as a musical instrument to utter sounds purely for their artistic value, not to convey information through language. Such is often the case with jazz music, particularly certain genres such as scat and bebop. Lyrics may also be indecipherable. But even in the best-case scenario for captioning --

where the music has lyrics that are both clearly delivered and literal -- captions nonetheless are inherently limited in their ability to effectively replicate musical lyrics or to give the viewer the ability to appreciate the nature or quality of the performer's vocal qualities. In every other form of video programming, captions do a far superior job of substituting for the auditory component of the program. News programs, movies and situation comedies -- all of which BET Holdings presents on its networks -- are excellent examples of classes of video programming that are well-suited to captioning. Consequently, even in an ideal world where all video programming was captioned, hearing-impaired viewers would likely choose to watch other programs that are better-suited to captioning, not captioned music programming.

But it is not an ideal world, and captioning is, as the Commission and Congress have recognized, an extremely expensive and complex proposition. This is especially so for music programming because of the unique and substantial challenges that characterize the captioning process for it. BET Holdings asks the Commission to give serious consideration to the costs and burdens associated with captioning of music programming in comparison to the lesser value to the hearing impaired of captioning such programming, and to recognize that the balance struck by such weighing produces a qualitatively different result in the case of music programming than it does in the case of all other forms of video programming. BET Holdings suggests that the Commission should ask a series of questions to frame the relevant inquiry:

1. Can this particular kind of music programming be effectively captioned at all?
2. Even if it can, will captioning result in sufficiently significant benefits accruing to persons with hearing disabilities, such that a substantial number of hearing impaired viewers would be likely to watch this programming if it were captioned?

3. Do the real benefits to be derived from captioning such music programming outweigh the costs and burdens to the programmer and the diminution in the quality and/or quantity of the programmer's other programming that will certainly result due to the high cost of captioning music programming?

BET Holdings submits that such balancing produces a different result for music programming than it does for many other types of programming, and that the Commission should conclude that music videos and music performance programming, "ins and outs" that accompany such programming and background music should be exempt from mandatory captioning.

A. MUSIC VIDEOS

1. Music Videos Should Be Exempt From Required Captioning

In the NPRM, the Commission tentatively concluded that music videos² should not be exempt from captioning requirements because: (1) "many . . . are already being captioned," (2) the lyrics are "readily available for use by off line captioners," (3) "[m]usic videos are not highly perishable" and are widely distributed, and (4) music videos "often have significant production budgets." NPRM ¶ 82. Yet, the assumptions on which the Commission based its tentative conclusion are flawed, and these and other inaccurate assumptions threaten to cause the Commission to overestimate the economic feasibility, and to underestimate the burden on program networks, of required captioning of music videos.

² Although the Commission did not define the term "music videos" in the NPRM, they are generally considered in the music and video programming industry to be promotional pieces, which are provided by record producers to programmers at no charge, that generally depict the performance and/or thematic interpretation of one song, averaging three to five minutes in duration.

First, while these generalizations may apply "often" or "sometimes" to "many" music videos (*id.*), they do not apply to all music videos, including many presented on BET. At most, the Commission's assumptions safely apply only to some of the videos produced by the major record companies. Even in the context of major-label videos, the Commission's assumptions are overstated. While many major record companies do caption their music videos, many others do not, and those that caption do so in varying amounts. Although statistics on the exact percentage of major-label videos that are captioned are not readily available, the Recording Industry Association of America ("RIAA") states only that its members voluntarily caption "a majority" of the music videos they release.³ Thus, requiring captioning of even the major labels' videos would impose a substantial burden on programming networks such as BET that rely heavily on this form of programming.⁴

Second, contrary to the Commission's assumption, lyrics are not always provided by record companies, or available on request to BET. Many videos would have to be captioned

³ Recording Industry Association of America, Inc. Reply to Proposed Rule (Feb. 28, 1997) at 2, filed in response to the NPRM ("RIAA Comments").

⁴ Even though the proposed rules would place the legal responsibility for captioning on "video programming providers" (*i.e.*, cable operators and other multichannel video programming distributors) (NPRM ¶ 28), the Commission has recognized that the actual burden of complying with the captioning requirements will fall on programming networks and other program owners and producers. *See* NPRM ¶ 30 ("we anticipate that our rules will result in video programming providers incorporating such requirements in their contracts with video producers and owners, regardless of which party has the obligation to comply with our rules."). Individual cable operators will shift the captioning requirement to networks carried on their systems since it is not sensible or economically feasible for each operator to perform such captioning. But networks such as BET will be unable to force a number of record labels to caption, because those companies themselves presently lack the resources, economic where-with-all and economic incentives to caption. In other words, a substantial part of the burden of captioning music videos will fall on BET and similarly situated networks.

without benefit of lyrics, which greatly increases the difficulty, cost and burden, and reduces the value, of captioning. This is particularly true of the videos carried by BET, which focus on the hip-hop, jazz, rap, reggae and urban music art forms, all of which are characterized by substantial amounts of non-literal lyrics, slang, or even vocal improvisations such as scat and bebop.

Third, while a relatively few, highly successful videos have lengthy shelf-lives, most do not and receive little or no repeat play after their initial run. For example, the typical video is played on BET's music video programs for about ten weeks, and thereafter only rarely replayed.

Fourth, while some videos have substantial production budgets, many do not, and that is true of many of the videos carried by BET. Given the limited production budgets for such videos and their generally limited shelf-life, the Commission should not assume that all record companies will shoulder the cost of captioning across the board. Thus, the burden would fall on BET and similar networks. *See* note 4, *supra*.

Given that the Commission's assumptions are overly generalized and in some cases simply wrong, it would be inappropriate to require generally that music videos be captioned, particularly in the form of rules that will impose the burden of such captioning on program networks such as BET. Music videos are a major part of the promotional efforts by record producers and distributors, and economic incentives are apparently moving the recording industry in the direction of captioning.⁵ While all music video producers have market-based incentives to caption their videos, only some actually caption, and only a handful of these entities presently

⁵ RIAA Comments at 2, 5 (noting that "substantial closed captioning is being undertaken [for music videos]", and referencing the "vast number of videos already being closed captioned"); NPRM ¶ 82 ("With respect to music videos, we note that many of these programs are already being captioned . . .").

have the financial resources to do so for all or most of their music videos. Where the economics of music video production do not provide those incentives, the Commission should not impose such requirements by regulatory fiat, particularly when the burden of such rules will fall on program networks. And that burden will be heavy, indeed.

For example, BET's below-the-line production annual budget (*i.e.*, exclusive of pooled personnel costs) for "Rap City" is \$269,000. Based on an estimated hourly rate of \$1,200 hour for captioning of prerecorded programming,⁶ it would cost BET approximately \$480,000 to caption this programming annually, or 178 percent of the annual production budget for the show. Similarly, captioning costs would consume approximately 80 percent of BET's annual below-the-line production budget for "Unreal" and over 13 percent of the annual below-the-line budget for "Caribbean Rhythms." The impact on BET's overall production budget of having to bear this substantial cost for its eight music video shows would be intolerable and could force BET to drop uncaptioned music videos. This would harm not only BET and the record labels, but also would reduce diversity in the music video programming that BET provides to its viewers. Under these circumstances, the costs and burdens that mandated captioning would impose on BET and other similarly situated networks are patently unreasonable.

As the RIAA stated in its comments, "mandated closed captioning for music video[s] fits a round peg into a square hole" and "is not necessarily appropriate, or even possible on some videos."⁷ BET Holdings agrees with the position of RIAA and the National Association of

⁶ This estimated rate is in the lower half of the Commission's estimated range of \$800 to \$2,500 per hour. See NPRM ¶ 18.

⁷ RIAA Comments at 2-3.

Independent Record Distributors & Manufacturers ("NAIRD")⁸ that music videos should be exempt as a class of programming from the requirement of closed captioning.⁹

2. Alternatively, If The Commission Does Not Exempt All Music Videos, It Should Exempt Music Videos Produced By "Small-Label" Record Producers

The Commission's assumptions, upon which it based its tentative decision to require captioning of music videos, are particularly inapt for music videos produced by smaller record producers and distributors. Because of the vast differences in the production and distribution of major-label music videos and those produced by small (frequently independent) labels, mandated captioning would have one or more adverse effects. It would either: (1) impose substantial economic burden on small record labels, which some could not bear; (2) impose the burden of captioning such labels' videos on program networks such as BET; or (3) force networks such as BET to refrain from airing videos provided by labels that cannot afford to caption, leading to a further significant loss of diversity in the music videos carried by BET and similar networks. Therefore, should the Commission decline to exempt all music videos as a class, it should at least exempt music videos produced by small-label record producers.¹⁰

⁸ National Association of Independent Record Distributors and Manufacturers, Letter to FCC (Feb. 27, 1997) at 1, in response to the NPRM and attached as Appendix A to RIAA Comments ("NAIRD Comments").

⁹ The Commission's exemption should extend to music video programs -- programs that predominantly consist of music videos -- and thus include "ins and outs" (the short segments of dialogue used to transition into and out of the presentation of music videos) within this exemption. "Ins and outs" are discussed in detail in Section III(C).

¹⁰ "Small label producers" would be defined as those entities with that are not among the top six in annual market share for album sales. The top six recording distributors each have market shares ranging from 9 to 21 percent. All other small independent labels combined only have approximately 21 percent market share. Ed Christman, *Indies No. 1 in Total Album Market Share for First Time*, BILLBOARD, Jan. 18, 1997, at 60. This class based exemption would

The legislative history of Section 713(d) clearly demonstrates that Congress intended that, in making exemption decisions, the Commission should consider (1) the financial resources of the program owner (*i.e.*, the video producer), (2) the relative size of the audience share, and (3) the financial impact of the captioning requirement. *See* H.R. REP. 104-204, 104th Cong., 1st Sess. ("HOUSE REPORT") (1995) at 115. The narrow exemption proposed here is consistent with these principles. An informal telephone survey of music video producers conducted by BET indicated that small-label music videos are not captioned to the same extent as major-label videos. Economic reality accounts for this disparity, not a lessened desire on the part of small-label producers to make these videos more accessible to persons with hearing disabilities.

Contrary to the Commission's broad assumption, small-label videos are typically produced on very limited production budgets,¹¹ of which mandated captioning would consume a significant portion. Moreover, small-label videos typically have shorter shelf-lives and, therefore, the cost of captioning cannot be spread out over long periods of multiple showings. Consequently, many small-label video producers simply cannot and will not assume the burden of the additional cost of captioning.

Imposing a captioning requirement on such videos would force BET and other networks to bypass uncaptioned small-label videos, and to forego numerous videos of newly discovered and lesser-known performers often featured by such labels -- the very videos that give BET's music video programs their rich diversity and variety and that enable BET to respond to the

conserve Commission resources by making the otherwise inevitable case-by-case exemption determinations for individual music videos or video producers unnecessary.

¹¹ *See* NAIRD Comments at 1 ("very limited budgets").

music tastes and interests of its target audience. BET, like most other programming networks, lacks the resources to caption music videos and would therefore be forced to refrain from presenting music videos that are not captioned -- most often those produced by small labels. Several of BET's programs, such as "Video Vibrations" and "Caribbean Rhythms," rely heavily on small-label music videos. The continued viability of this kind of diverse music programming would be seriously jeopardized by the reduced availability to BET of small-label videos that would result if all such videos were required to be captioned. Indeed, BET Holdings agrees with the statement of NAIRD that mandatory captioning "could very well prevent many of these videos from being released."¹² This would be an unfortunate result indeed, as these videos greatly contribute to the diversity of music video programming.

An exemption for small-label videos would be quite limited in effect. It would not apply to the major record labels, who produce the majority of music videos and generally those with the widest distribution and viewership. Even on a niche programming network such as BET, only about twenty percent of the music videos presented are produced by small-label record companies. Moreover, small-label producers, who also have market-based incentives to caption and will face increasing competitive pressures to caption, will likely caption their videos voluntarily as soon as they can reasonably afford to do so. Finally, as captioning technology improves, it will become much more affordable for small record companies to provide this service.

In summary, the Commission should recognize that several of its broad assumptions regarding music videos are inaccurate and do not warrant a requirement that all music videos be

¹² *Id.*

captioned and certainly do not apply to those produced by smaller record companies. Small-label producers of music videos would suffer disproportionate economic harm as a result of this mandate, and the viewing public ultimately would suffer the consequences -- diminished distribution of diverse music videos targeting niche audiences. BET Holdings urges the Commission to avoid this result by exempting music videos entirely or, at a minimum, by exempting music videos produced by smaller record companies.

B. MUSIC PERFORMANCE PROGRAMMING

1. Musical Performance Programming -- Whether Live Or Prerecorded, Vocal Or Instrumental -- Should Be Exempt From Required Captioning

In the NPRM, the Commission tentatively concluded that it would be "reasonable" to subject prerecorded "musical performances" to mandatory closed captioning, unless these performances are primarily instrumental. NPRM ¶ 82. Yet, the only support noted by the Commission for this proposed requirement is the fact that HBO uses this practice for the concerts it distributes. *Id.* The Commission reached no tentative conclusion for live musical performances and requested comment on whether such programming should be exempt. *Id.*

The Commission's tentative conclusions are inappropriate for several reasons. First, the Commission failed to define the term "musical performances." This omission raises practical difficulties and questions. For example, if a program consists of a combination of musical performances and other segments (*e.g.*, interviews), is this program a musical performance? BET Holdings suggests that it would be more useful to employ the term "musical performance program," defined as "a video program in which more than fifty percent of the program content is comprised of one or more musical performances"; time set aside for commercials and other interstitials would not be considered as part of the program content for purposes of the

calculation. This is a workable definition because it will allow programmers to classify a program as a whole as either exempt or non-exempt, rather than having to make separate determinations regarding individual segments within a program. It also is more in harmony with viewing patterns of persons with hearing disabilities, since they are likely to make viewing selections on a program-by-program basis rather than on a program-part basis; it would make no sense to require captioning of a small segment of a program that is otherwise not subject to the captioning requirement and that persons with hearing disabilities therefore are unlikely to watch.

Second, the Commission's tentative proposal fails to realistically balance the limited benefits of increased accessibility to this type of programming against economic realities, as mandated by Congress in enacting Section 713. The Commission's rationale for its tentative conclusion dramatically illustrates its misunderstanding of the costs and burdens of captioning this type of programming. It is not appropriate for the Commission to conclude, because captioning may be economically feasible for an entity such as HBO -- which, as the largest premium cable network and a division of Time-Warner Entertainment, one of the world's largest media conglomerates, has the financial resources to create an in-house captioning department -- that this is commercially feasible for all programmers, including niche programming networks such as BET On Jazz. Nor is it appropriate for the Commission to conclude, as some commenters asserted in responding to the NPRM, that because major awards programs such as the Grammy Awards and the Academy Awards, which have enormous production budgets and

gargantuan worldwide audiences, are captioned, all musical performances can realistically be captioned.¹³

A large portion of BET On Jazz's new programming, which it produces at its production studios in Washington, D.C., is musical performance programming.¹⁴ For example, "Jazz Discovery" is a one-hour program produced by BET On Jazz that showcases musical performances by undiscovered jazz talent. Requiring captioning of music performance programming would create a substantial economic burden for BET On Jazz, and for many other producers of such programming. To illustrate, using a conservative estimate of captioning costs for prerecorded programming¹⁵ of \$1,200 per hour, BET On Jazz estimates that the cost to caption "Jazz Central" would consume approximately 21 percent of the annual below-the-line production budget for this program. Overall, BET On Jazz estimates that the cost to caption its programming for 1997, the vast majority of which is musical performance programming, would consume approximately 25 percent of the network's annual programming budget. Clearly, mandated captioning would impose a staggering economic burden on BET On Jazz and most other producers of musical performance programming and would devastate the network's already limited production budget.

While the costs of captioning musical performances would be substantial, the net benefit to be derived would be very limited -- even if the music performance programming contained

¹³ Response of League for the Hard of Hearing (Feb. 28, 1997) at 8, filed in response to the NPRM.

¹⁴ New programming constitutes approximately half of BET On Jazz's total programming. The other half is library programming.

¹⁵ Currently, all of BET On Jazz's programming is prerecorded. However, some of this programming is taped at BET On Jazz's studios and aired the same day.